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In the Supreme Court of the United States

OCTOBER TERM, 1977

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

HIRAM G. HILL, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 1064. The opinion of the district court (Pet. App. B) is reported at 419 F. Supp. 753.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on January 31, 1977. The petition for a writ of certiorari was filed on May 31, 1977, and granted on November 14, 1977 (A. 588). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Endangered Species Act of 1973 prohibits completion of a federal water project that was more than 50 percent complete when the Act was passed and was approximately 75 percent complete when a newly discovered fish was listed as an endangered species under the Act because its habitat would be threatened by the project.

2. Whether, when a species is listed under the Endangered Species Act, a federal water project that is substantially finished may be completed and used despite its adverse effects on the species if Congress, with full knowledge of such effects, continues to approve the project by appropriating funds for its completion and specifically states, through the reports of appropriations committees, that it should be completed.

STATUTES INVOLVED

Section 7 of the Endangered Species Act of 1973, 87 Stat. 892, 16 U.S.C. (Supp. V) 1536, provides:

Interagency Cooperation.

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by

> taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

STATEMENT

In 1966 Congress appropriated initial funds for the construction by the Tennessee Valley Authority ("TVA") of the Tellico Dam and Reservoir project, a federal multi-purpose dam and reservoir on the Little Tennessee River in eastern Tennessee (Pet. App. A, p. 2a; *Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F. 2d 1164, 1170 (C.A. 6) (*"Tellico I"*)).[1] Tellico is a comprehensive water resource and regional development project designed to develop navigation, control flooding, generate electric power, provide water supply, promote industrial and recreational development, and generally improve economic conditions in an economically depressed area (Pet. App. A, p. 2a).

Construction began in March 1967 (Pet. App. A, p. 2a). Congress has appropriated funds for the proj-

[1] The appropriation Act was Public Works Appropriation Act, 1967, 80 Stat. 1002, 1014. Sections 4(j) and 27 of the Tennessee Valley Authority Act, 48 Stat. 61, 71, 16 U.S.C. 831c(j) and 831z, contain general authorizations for TVA projects. Congress periodically appropriates funds for specific projects. Congressional decision-making with respect to the construction and carrying forward of particular TVA projects is thus largely confined to the appropriations process.

ect in every year since 1966 (*Tellico I, supra*, 468 F. 2d at 1170; Pet. App. B, pp. 31A–32A; see also pp. 7–11, 14–18, *infra*). At present the project is virtually complete and ready for the closing of the gates to impound the reservoir.[2]

The project has been the subject of previous litigation. In 1972 the Court of Appeals for the Sixth Circuit affirmed a preliminary injunction that halted construction of the project until TVA complied with the applicable requirements of the National Environmental Policy Act (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.* (*Tellico I, supra*). The district court ultimately concluded that TVA's final environmental impact statement for Tellico complied with NEPA (*Environmental Defense Fund* v. *Tennessee Valley Authority*, 371 F. Supp. 1004 (E.D. Tenn.)), and the court of appeals, in 1974, affirmed. *Environmental Defense Fund* v. *Tennessee Valley Authority*, 492 F. 2d 466 (C.A. 6) (*"Tellico II"*).

In August 1973, a three-inch fish, named the snail darter (because it feeds on fresh-water snails), was discovered in the stretch of the river scheduled to be

[2] The Chairman of TVA's Board of Directors reported to committees of both Houses of Congress on March 7, 1977: "[The project] stands ready for the gates to be closed and the reservoir filled" (Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1978, before a Subcommittee of the House Committee on Appropriations, 95th Cong., 1st Sess., Part 4, 234 (1977); Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1978, before a Subcommittee of the Senate Committee on Appropriations, 95th Cong., 1st Sess., Part 5, 127 (1977)). Certain additional work such as completion of roads and bridges, entailing relatively minor expenditures, remains to be finished.

impounded by the reservoir (Pet. App. A, p. 4A). Darters are members of the perch family. There are approximately 130 known species of darters, 85 to 90 of which are found in Tennessee. Eight to ten new ones have been discovered in the last five years, and about 12 in the last ten years.[3]

In December 1973, when the Tellico project was more than 50 percent complete (Pet. App. B, p. 33A), Congress enacted the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. (Supp. V) 1531 *et seq.* Section 7 of the Act, 87 Stat. 892, 16 U.S.C. (Supp. V) 1536, titled "Interagency Cooperation," provides in full:

> "The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened

[3] TVA's final environmental impact statement for the Tellico project (approved in *Environmental Defense Fund* v. *Tennessee Valley Authority*, 371 F. Supp. 1004 (E.D. Tenn.), affirmed in *Tellico II*, *supra*, 492 F. 2d 466), listed 11 species of darters known to occur, or possibly occurring, in the portions of the Little Tennessee River to be impounded (Pet. App. B, p. 31A, n. 7). The district court here noted that "new species of the darter continued to be discovered in Tennessee at about the rate of one per year" (*ibid.*).

species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

In January 1975, respondents and others petitioned the Secretary of the Interior to list the snail darter as an endangered species pursuant to Section 4 of the Act, 16 U.S.C. (Supp. V) 1533. In November 1975, when the Tellico project was approximately 75 percent completed (Pet. App. B, p. 33A), the Secretary designated the snail darter as an endangered species (40 Fed. Reg. 47505–47506). He did so on the basis of his determination that the only known habitat of the fish was that portion of the Little Tennessee River scheduled to be impounded by the Tellico Reservoir, and that "[t]he proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat" (*id.* at 47506). In April 1976, the Secretary designated a portion of the river included within the area of the proposed reservoir as the snail darter's "critical habitat" pursuant to Section 7 of the Act. 41 Fed. Reg. 13926–13928.

In February 1976, respondents filed this suit pursuant to Section 11(g) of the Act, 16 U.S.C. (Supp. V) 1540(g),[4] to enjoin the completion of the dam and the impoundment of the reservoir on the ground that

[4] 16 U.S.C. (Supp. V) 1540(g) provides in pertinent part that "any person may commence a civil suit on his own behalf • • • to enjoin • • • any • • • governmental instrumentality or agency • • • who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof • • •."

those actions would violate Sections 7 and 9 of the Act, 16 U.S.C. (Supp. V) 1536, 1538.[5]

Prior to and during this litigation, members of TVA's Board of Directors testified for three successive years, 1975, 1976, and 1977, in House and Senate appropriations hearings in support of budget requests for various TVA projects, including Tellico, submitted by the President. They testified about all aspects of the problems involving the snail darter and the Tellico project, including the discovery of the snail darter, its listing as an endangered species, its habitat, and the effect of the project on it.

In hearings in April 1975 before a Subcommittee of the House Committee on Appropriations, they described the discovery of the snail darter and the efforts by opponents of the project to halt its completion by relying on the Endangered Species Act.[6] They

[5] While respondents contended in both the district court and the court of appeals that the completion of the project would violate Section 9 of the Act, that question was not reached below (Pet. App. A, p. 9A n. 13). Section 9(a)(1)(B) makes it unlawful to "take any [endangered] species within the United States." Section 3(14), 16 U.S.C. (Supp. V) 1532(14), of the Act defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect • • •." In adopting this definition, Congress deleted "the destruction, modification, or curtailment of its habitat or range" from the list of prohibited activities. Compare the original language of Section 3(6) of S. 1983, 93d Cong., 1st Sess. (1973), with Section 3(14) of the Act.

[6] Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1976, before a Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess., Part 7, 466–467 (1975); see also Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1976, before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 1st Sess., Part 4, 3775–3777 (1975).

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stated that in TVA's view the Act did not prohibit the completion of a project authorized, funded, and substantially constructed before the Act was passed, concluding that:

> [W]hile we will do our best to preserve the darter if it in fact proves to be a distinct species and is listed as endangered, the project should be completed in any event * * *.[7]

In recommending appropriations of $29 million for the Tellico project through September 1976, the House Committee on Appropriations, in its report dated June 20, 1975, stated:

> The Committee directs that the project, for which an environmental impact statement has been completed and provided the Committee, should be completed as promptly as possible for energy supply and flood protection in the public interest.[8]

The bill appropriating that amount was passed by Congress and signed by the President in December 1975, one month after the snail darter was placed on the endangered species list. Public Works for Water and Power Development and Energy Research Appropriation Act, 1976, 89 Stat. 1035, 1047.[9]

In appropriations hearings in March 1976 in the House and Senate, TVA Directors again testified about

[7] Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1976, before a Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess., Part 7, 467 (1975).

[8] H.R. Rep. No. 94–319, 94th Cong., 1st Sess. 76 (1975).

[9] The appropriations Acts involved in this case provided lump sum appropriations for TVA and did not themselves identify the projects for which the sums had been appropriated. Identification of these projects requires reference to the legislative history.

the status of the snail darter and about this recently filed lawsuit. They reiterated TVA's position "that Congress did not intend the Endangered Species Act to be retroactively applied to existing projects like Tellico, which was over 50 percent complete at the time of the act's passage and the fish's discovery, and which was 70 to 80 percent complete at the time of the official listing of the snail darter as an endangered species." [10]

Meanwhile, respondent Hiram Hill testified at the appropriations hearings in the House and submitted a written statement attacking the Tellico project and TVA's view of the Endangered Species Act.[11] Mr. Hill began his statement with the contention that "[t]he long debated TVA Tellico project is in direct conflict with the Rare and Endangered Species Act of 1973," and he reiterated that contention throughout his statement and accompanying testimony. He asserted that "[t]he project should be halted now

[10] TVA added, *inter alia*: "We are doing our best to preserve the snail darter, and the results to date have been very encouraging. We cannot guarantee that the transplant [of the fish to another river] will ultimately be a success. In any event * * * we believe the Tellico project must be completed on schedule." Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977, before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., Part 5, 261–262 (1976); Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977, before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 2d Sess., Part 4, 3096–3099 (1976).

[11] Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977, before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., Part 8, 979–984 (1976).

and all unused funds for the project should be recalled." [12]

Following these hearings, both the House and the Senate Committees recommended the full Presidential budget request of $9.7 million for Tellico for the fiscal year ending September 30, 1977.[13] In its report of June 17, 1976, the Senate Committee made the following statement:

TELLICO PROJECT

> The bill, as reported, contains the full $9.7 million budget request for the Tellico project. During subcommittee hearings, TVA was questioned about the relationship between the Tellico project's completion and the November 1975 listing of the snail darter (a small 3-inch fish which was discovered in 1973) as an endangered species under the Endangered Species Act. TVA informed the Committee that it was continuing its efforts to preserve the darter, while working towards the scheduled 1977 completion date. TVA repeated its view that the Endangered Species Act did not prevent the completion of the Tellico project, which has been under construction for nearly a decade. The subcommittee brought this matter, as well as the recent U.S. District Court's decision upholding TVA's decision to complete the project, to the attention of the full Committee. The Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage and directs that this project be completed as promptly as possible in the public interest.[14]

[12] *Id.* at 979.

[13] S. Rep. No. 94–960, 94th Cong., 2d Sess. 96 (1976); H.R. Rep. No. 94–1223, 94th Cong., 2d Sess. 83 (1976).

The appropriations bill passed both Houses of Congress on June 29, 1976, and was signed into law by the President on July 12. Public Works for Water and Power Development and Energy Research Appropriation Act, 1977, Pub. L. 94–355, 90 Stat. 889, 899.

The district court, on May 25, 1976, denied respondents' request to enjoin completion of the project and dismissed the complaint (Pet. App. B). Although the court found that impoundment of the reservoir would "result in the adverse modification, if not complete destruction, of the snail darter's critical habitat" (*id.* at 27A–28A), it concluded that the Endangered Species Act was not intended to prohibit the completion of a project that was authorized and begun seven years before the Act was passed and which at the time of the trial (April 1976) was about 80 percent completed with about $80 million invested (*id.* at 33A–34A, 36A). The court stated:

> At some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result [*id.* at 36A–37A].

[14] S. Rep. No. 94–960, *supra*, at p. 96. The court of appeals erroneously characterized this statement and the statement in the 1975 report of the House Appropriations Committee (see p. 8, *supra*) as "pronouncements of two congressional appropriations subcommittees" (Pet. App. A, p. 18A).

The court found support for its view in Congress's continued appropriations for the project with full knowledge of its effect on the snail darter (*id.* at 39A). And it found that "[t]he nature of the project is such that there are no alternatives to impoundment of the reservoir, short of scrapping the entire project" (*id.* at 31A).

On January 31, 1977, the court of appeals reversed (Pet. App. A). The court held that closure of the dam, since it would jeopardize the continued existence of the snail darter, would violate the provision of Section 7 of the Endangered Species Act which "unequivocally commits" all federal agencies to

> utilize their authorities in furtherance of the purposes of [the Act] by * * * taking such action necessary to *insure* that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary * * * to be critical [Pet. App. A, p. 5A (emphasis by the court).]

The court rejected the argument made by TVA, and accepted by the district court, that Section 7 should not be read "to include the terminal phases of ongoing projects among the 'actions' of departments and agencies to be scrutinized for compliance" (*id.* at 11A). It said instead that it would "give the term 'actions' its plain meaning" (*id.* at 11A), declaring that "[c]onscientious enforcement of the Act requires

that it be taken to its logical extreme" (*id.* at 12A).[13] Although the court was "sympathetic to [the district court's] analysis of the equitable factors present here which would normally militate against granting injunctive relief," it held that the district court "abused its discretion when it refused to enjoin a clear violation of federal law" (*id.* at 20A) by refusing "to permanently enjoin all further actions by TVA which may detrimentally alter the critical habitat of the snail darter" (*id.* at 18A).

The court of appeals declined to attribute any significance to the appropriations statutes of 1975 and 1976 or to the reports of the House Appropriations Committee in 1975 and the Senate Appropriations Committee in 1976 (see pp. 8–10, *supra*) directing completion of the project "as promptly as possible in the public interest." The court held that those appropriations Acts and statements did not constitute "legislative acquiescence in or express ratification of" TVA's position that the Endangered Species Act was not intended to apply to the Tellico project (*id.* at 15A). It said that they were "[a]dvisory opinions by

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[13] The district court had posed a hypothetical example:

> If plaintiffs' argument were taken to its logical extreme, the Act would require a court to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before such impoundment was scheduled to take place [Pet. App. B, p. 43A].

The district court stated: "We cannot conceive that Congress intended such a result" (*ibid.*). The court of appeals repeated the example and embraced the result (Pet. App. A, p. 12A).

Congress" concerning the scope of the Act, which could not bind the court "[i]f the separation of powers doctrine is to retain its vitality * * * " (*id.* at 15A–16A).

In March 1977, following the decision of the court of appeals, members of TVA's Board of Directors again testified at House and Senate hearings in support of requested appropriations, including appropriations for completing certain ancillary parts of the Tellico project, such as public use areas, roads, and bridges. They again reported on all aspects of the snail darter problem, including the decision of the court of appeals. Among other things, they stated that the snail darters transplanted to two other rivers "are doing well and have reproduced," and that there were about the same number of the fish in the transplant areas as there were in the proposed reservoir area (Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1978, before a Subcommittee of the House Committee on Appropriations, 95th Cong., 1st Sess., Part 4, 235, 261–262 (1977).[16] The Directors reported that the Tellico dam "stands ready for the gates to be closed and the reservoir filled" (*id.* at 234), and asked

[16] At the trial respondents' witnesses testified that the transplant program was a "good one" (A. 185), that they found "no fault" with it (A. 199), and that TVA was "doing everything humanly possible to conserve the snail darter" while completing the project (A. 158). The district court found that "[t]he evidence shows that TVA has made a good faith effort to conserve the snail darter while carrying out its plans to complete the project" (Pet. App. B, p. 30A).

for guidance from Congress with respect to the conflict between the court of appeals' decision halting the project and Congress's directives to TVA in 1975 and 1976 to complete the project "as promptly as possible * * * in the public interest" (*id.* at 235–236).

The House Appropriations Committee in its report of June 2, 1977, recommended appropriation of the full amount requested in the President's budget for the Tellico project (H.R. Rep. No. 95–379, 95th Cong., 1st Sess. 103 (1977)). The Committee stated:

> It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act [*id.* at 104].

The Committee recommended that instead of delaying or stopping such projects, the endangered species should be relocated:

> Where such work is determined to be a threat to any endangered species, the Committee recommends that the agencies cooperate fully with the Secretary of Interior, as contemplated by the Act, to relocate the endangered species to another suitable habitat so as to permit the project to proceed as rapidly as possible [*id.* at 11].

To facilitate such relocation the Committee recommended special appropriations totaling $9 million, of which $2 million was for TVA, explaining:

> It is expected that this arrangement will provide a positive means to expedite construc-

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> tion of projects deemed important enough to be funded in this bill, and at the same time to permit the attainment of the purposes of the Endangered Species Act. The relocation of endangered species, rather than delay or stoppage of projects, should be of direct benefit to both programs and should obviate the need for confrontation and litigation between those charged with the responsibilities for each [*ibid.*].

The Senate Appropriations Committee concurred in the House Committee's recommendations with respect to both the amount requested for Tellico and the special appropriations for relocation of endangered species (S. Rep. No. 95-301, 95th Cong., 1st Sess. 7, 98 (1977)). After referring to the court of appeals' decision, the Senate Committee stated that it had "carefully reviewed" Tellico and another TVA project, and concluded that:

> A thorough balancing of the benefits of the projects against their environmental consequences has been performed. These projects will provide needed flood control; jobs and industrial development; water supply and recreational opportunities; improved navigation in the case of Tellico; and other benefits. In addition, the Tellico project will provide an average of about 200 million kilowatt hours of electricity annually. These projects are sound regional development projects which are vitally important to the people of the regions affected. This Committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well under way at the time the affected species were listed as endangered. If the act has such an effect, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.
>
> • • • Congress, having been fully informed of the Endangered Species Act problem as related to these projects, approved the appropriation for the Tennessee Valley Authority for these projects, based on the Committee's view of the Endangered Species Act and its application to the Tellico and Duck River projects. The Committee again recommends approval of the appropriations based on the foregoing views and considerations [*id.* at 99].

The appropriations bill as proposed by the committees was debated on the floor of both Houses. The debate in the House of Representatives included a discussion of the snail darter and other endangered species. Congressman Bevill, floor manager of the bill, stated (123 Cong. Rec. H5760-H5766 (daily ed., June 13, 1977)):

> We are recommending $131,823,000 for the Tennessee Valley Authority.
>
> We heard considerable testimony from TVA witnesses concerning the snail darter and the pearly mussel, endangered species that now threaten the completion of two TVA water resource projects, the Tellico Dam and the Columbia Dam. It is our belief that in too many instances, these examples included, the Endangered Species Act is being used as a vehicle

> not to protect threatened wildlife, but to stop growth and progress.
>
> We are impressed with the need for these projects and are confident that the endangered species can be sufficiently protected through relocations and other efforts. Consequently, funding is recommended for these projects and we encourage the TVA to find equitable solutions to the problems posed by the endangered species.

The bill was approved by both Houses and signed into law on August 7, 1977 (Public Works for Water and Power Development and Energy Research Appropriation Act, 1978, Pub. L. 95-96, 91 Stat. 797). The Act (91 Stat. 808), in appropriating funds to TVA to complete the Tellico project and for other purposes, stated:

> That not to exceed $2,000,000 of this appropriation is available to carry out the purposes of the Endangered Species Act of 1973 (Public Law 93-205), as amended, including cooperative efforts as contemplated by that Act to relocate endangered or threatened species to other suitable habitats as may be necessary to expedite project construction.[17]

[17] In February 1977, TVA petitioned the Secretary of the Interior to withdraw his designation of the Little Tennessee River as a critical habitat of the snail darter on the basis of (1) evidence that some 700 snail darters transplanted to another river in 1975 had reproduced and increased, and (2) evidence that the very existence of the dam, even without closure of the sluice gates, had made it impossible for snail darters to return through the sluices to their spawning grounds above the dam. (Meanwhile, in each of the last two years, TVA, in cooperation with the Department of the Interior, has moved snail darters from locations below the dam to locations above the dam.) The Secretary has recently denied TVA's petition.

SUMMARY OF ARGUMENT

I

The court of appeals erred in concluding that Section 7 of the Endangered Species Act prohibits the completion of a project that was begun six years before the Act was passed, that was more than 50 percent complete when the Act was passed, and that was approximately 75 percent complete when a species affected by the project was listed as endangered and its habitat listed as critical. Section 7, entitled "Interagency Cooperation," directs all federal agencies to consult with the Secretary of the Interior regarding actions affecting endangered species and to "utilize their authorities in furtherance of the purposes of this Act * * * by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species * * * or result in the destruction or modification of [a critical] habitat of such species * * *."

The court of appeals erroneously construed "actions authorized, funded, or carried out" to include any action an agency may take with respect to a public works project. This construction would prohibit an agency from maintaining a long-completed facility that was found to threaten the habitat of a newly discovered endangered species. It would prohibit an agency from putting into use a fully completed project that was found to have such an effect, regardless of the amount of resources that had been expended on the project and that would consequently be wasted, and regardless of the importance of the

project to the agency's program and the public interest. Such a construction is unreasonable and could not have been intended by Congress; nor is it required by any "plain meaning" of the statutory language.

A more reasonable construction, in keeping with the Act as a whole and the language and purpose of Section 7, would not interpret the statute to prohibit the concluding stages of a project when they are functionally a part of an action already carried out. It would read Section 7 as directed to those points in the decision-making process when an agency is deciding whether an action should be "authorized, funded, or carried out"—when it has before it reasonable alternatives, choices that are consistent with commitments already made and that do not exact substantial waste of unrecoverable resources. Where that point occurs will vary with each case and requires consideration of the objectives of Congress in authorizing a project, the alternatives available, and the extent of losses that would be occasioned by the various alternatives.

Such a construction is supported by general principles against construing statutes to reach an unreasonable result or produce a retroactive effect. It is supported specifically by decisions in analogous contexts under the National Environmental Policy Act, which have held that that Act was not intended to apply to projects at an advanced stage of construction when the Act was passed. As the court stated in *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323, 1331 (C.A. 4), certiorari denied *sub nom.*

Fugate v. *Arlington Coalition on Transportation*, 409 U.S. 1000: "At some stage, federal action may be so 'complete' that applying the Act could be considered a 'retroactive' application not intended by the Congress."

Such a construction, moreover, is consistent with the legislative history of the Endangered Species Act. Nothing in that history indicates an intent to halt the completion of substantially completed projects. Some of it indicates an intent to give the responsible agency some discretion to determine whether the public interest warrants that a project go forward notwithstanding its potential effects on an endangered species. Furthermore, the legislative history of subsequent statutes, appropriating funds for the completion of the Tellico project for three successive years with full knowledge of its potential effects on the snail darter, expressly states that the Endangered Species Act was not intended to halt completion of this project in its advanced stage.

II

If the Court agrees with our construction of the Endangered Species Act, that alone is a sufficient basis for reversing the court of appeals and reinstating the district court's judgment dismissing the complaint. But assuming *arguendo* that the Endangered Species Act standing alone would prohibit completion of the Tellico project, the subsequent appropriations for the project demonstrate Congress's intent that it should go forward notwithstanding.

As a general principle, cou[illegible] should not ordinarily infer from appropriations acts an intent by Congress to repeal or modify substantive law. But where Congress has clearly indicated such an intent, decisions of this Court and the courts of appeals establish that the courts must give effect to it. In the particular and unusual circumstances presented here, Congress has indicated such an intent with respect to the Tellico project.

In this case the purpose of the subsequent appropriations Acts is irreconcilable with the Endangered Species Act as construed and applied to this project by the court of appeals. Of course, Congress did not believe that its appropriations were in conflict with the Act; it believed—correctly, we submit—that the Act did not apply to projects such as this one.

But accepting *arguendo* the interpretation of the Endangered Species Act that the respondents urged and the court of appeals adopted—an interpretation of which Congress was well aware—there is a conflict between the Act and the subsequent appropriations measures in their application to this project. Either Congress intended that the project be halted, or Congress intended that it go forward whether or not the Endangered Species Act would otherwise forbid it. That conflict distinguishes this case from the typical ones in which subsequent appropriations Acts can be reconciled with the substantive commands of prior law. It requires a thorough examination of the evidence of Congress's intent.

The specific evidence of Congress's intent with respect to this particular project is reflected in the reports of Committees of both Houses on the enacted appropriations Acts in three successive years. Moreover, the appropriations Act adopted in 1977, after the decision of the court of appeals, contained a special appropriation for the purpose, stated in the Act itself, of enabling TVA "to relocate endangered or threatened species to other suitable habitats as may be necessary to expedite project construction." This enactment was intended as a legislative resolution of the impasse created by the court of appeals' decision. The totality of the legislative record over the three-year period likewise shows that Congress intended that the Tellico project be completed notwithstanding the asserted prohibition of the Endangered Species Act.

ARGUMENT

I

SECTION 7 OF THE ENDANGERED SPECIES ACT DOES NOT PROHIBIT COMPLETION OF THE TELLICO PROJECT

Construction of the Tellico project began in 1967. The project was more than 50 percent completed when the snail darter was discovered in August 1973 and when the Endangered Species Act was enacted in December 1973 (Pet. App. B, p. 33A). The project was approximately 75 percent completed when the snail darter was listed as an endangered species in November 1975 (Pet. App. B, p. 33A). In April 1976, when the Secretary listed the portion of the river to be impounded as the snail darter's "critical habitat"

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and when the trial was held, the project was about 80 percent completed and about $80 million had been invested in it (Pet. App. B, pp. 33A–34, 36A).[18]

The district court ruled that Section 7 of the Endangered Species Act was not intended to prohibit completion of a project in such circumstances. "At some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result," the court said (Pet. App. B, pp. 36A–37A). The court of appeals, however, held that Section 7 does "include the terminal phases of ongoing projects among the 'actions' of departments and agencies to be scrutinized for compliance" (Pet. App. A, p. 11A). The court said it would "give the term 'actions' its plain meaning" (*id.* at 11A), declaring that "[c]onscientious enforcement of the Act requires that it be taken to its logical extreme" (*id.* at 12A).

We submit that Section 7 of the Act does not prohibit completion of the Tellico project. The language referring to "actions authorized, funded, or carried out" by federal agencies does not mean *every* action by such an agency, including the dedication of a project long under construction or the maintenance of a project already in operation. It means actions that present the agency with reasonable alternatives; it refers to a stage in the decision-making process where

[18] The district court found that of the $80 million, approximately $53 million would be nonrecoverable if the project was not completed (Pet. App. B, p. 35A). Since then, TVA estimates that an additional $27 million has been invested in the project under the direction of Congress, much of which would be nonrecoverable.

the agency has not substantially completed an "action" but is still in a reasonable position to avoid authorizing it, funding it, or carrying it out. This interpretation accords with the language of Section 7 and is supported by the structure and purpose of that section, by principles of statutory construction reflected in relevant case law, by such indications as there are in the legislative history, and by confirmation in subsequent congressional enactments.

A. THE STATUTORY LANGUAGE DOES NOT COMPEL THE COURT OF APPEALS' CONSTRUCTION OF THE ACT

Section 7 of the Act, in relevant part, directs all federal agencies to

> utilize their authorities in furtherance of the purposes of this Act * * * by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species * * * or result in the destruction or modification of [a critical] habitat of such species * * *.

While the court of appeals purported to "give the term 'actions' its plain meaning," it is well established that even the unambiguous meaning of statutory words does not control when such a reading would be unreasonable in view of the statute's purpose.[19] Here,

[19] In *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459, the Court stated:

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. * * * This is not the substitution of the will of

the meaning of the term "actions" is not so "plain" in the first place. The word is part of the phrase: "actions authorized, funded, or carried out." If the verb "carried out" is read *in pari materiae* with "authorized" and "funded," as it should be, one sees that the "actions" referred to are not all the actions that an agency can ever take, but rather actions that the agency is deciding whether to authorize, to fund, or to carry out. That is, they are *prospective* actions—actions with respect to which the agency has reasonable decision-making alternatives before it.

The "actions" that an agency would be prohibited from "carrying out" under the statute do not include, for example, each day's maintenance of a completed highway or military installation which is found to threaten the critical habitat of a newly discovered endangered species. The agency would not be required,

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the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

See also *United States* v. *Witkovich*, 353 U.S. 194, 199; *United States* v. *American Trucking Assns., Inc.*, 310 U.S. 534, 543; *International T. & T. Corp.* v. *General T. & E. Corp.*, 518 F. 2d 913, 917–918 (C.A. 9); *City of Los Angeles* v. *Adams*, 556 F. 2d 40 (C.A. D.C.).

One well-known line of cases in which this Court has refused to apply the literal words of a statute to produce an unreasonable result involves the construction of the words "every person" in 42 U.S.C. 1983. *E.g.*, *Tenney* v. *Brandhove*, 341 U.S. 367; *Pierson* v. *Ray*, 386 U.S. 547; *Imbler* v. *Pachtman*, 424 U.S. 409.

in such a case, to let the project revert to a wilderness condition. Nor would the prohibited "actions" include, as in the hypothetical example discussed by the courts below (Pet. App. B, p. 3A; Pet. App. A, p. 12A; see note 15, *supra*), the impounding of water behind a fully completed dam where an endangered species of fish was discovered in the river (or an endangered species of plant on the land) the day before the impoundment was scheduled to take place. To construe the statute as including such "actions" would be unreasonable and could not have been intended by the Congress; nor is it required by any "plain meaning" of the words.

A more reasonable construction, in keeping with Section 7 as a whole, with its purpose, its title ("Interagency cooperation"),[20] and its prospective focus, would define "actions" to be "carried out" in terms of those points in the decision-making process where the agency can still make choices, choices that are consistent with commitments it has already made and that do not require substantial waste of unrecoverable re-

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[20] As the title indicates, a central concern of Section 7 is cooperation between the Secretary of the Interior and other agencies to promote the purposes of the Act. The court of appeals, in an apparent effort to soften its draconian interpretation of the Act, stated that "the Secretary of the Interior can properly exempt Tellico from compliance with the Act" (Pet. App. A, p. 20A). The Secretary, however, would appear to have no such authority with respect to Section 7 (compare his authority under Section 10 to grant "exceptions" for violations of Section 9). He could "exempt Tellico" only by making a supportable determination, on the record, that the snail darter was no longer an endangered species or that the stretch of river in question was no longer a "critical habitat" of the snail darter.

sources.[21] At some point in the development of a public works project, further steps to complete it or to put it into operation are not new actions within the meaning of the statute, but an inseparable part of actions already taken. Where that point occurs will vary

[21] Proposed regulations under the Act prepared jointly by the Fish and Wildlife Service (FWS) of the Department of the Interior and the National Marine Fisheries Service (NMFS) of the Department of Commerce originally took just this position, stating in a preamble:

> Neither FWS nor NMFS intends that section 7 bring about the waste that can occur if an advanced project is halted. * * * The affected agency must decide whether the degree of completion and extent of public funding of particular projects justify an action that may be otherwise inconsistent with Section 7. [42 Fed. Reg. 4868, 4869.]

However, in the recently promulgated final regulations the issuing agencies have retracted this view, explaining:

> This discussion in the preamble was based on an analysis of the case law on retroactivity under NEPA. It was originally believed that retroactive situations under NEPA and the Act were analogous enough to warrant the incorporation of the NEPA case law into the Section 7 regulations.
>
> The Sixth Circuit Court of Appeals in the recent case of *Hill* v. *TVA* * * * considered this analogy and rejected it. * * * In light of the Sixth Circuit Court of Appeals' analysis, therefore, the FWS and NMFS now reject the analysis of retroactivity in the proposed rulemaking's preamble and adopt the rationale of the Sixth Circuit. [50 C.F.R. 402.03, 43 Fed. Reg. 870, 872, 875.]

President Carter, however, in his Environmenal Message delivered to Congress on May 23, 1977, stated (13 Weekly Comp. Pres. Docs. 782 792 (1977)):

> * * * [T]o hasten the protection of threatened and endangered species, I am directing the Secretaries of Commerce and Interior to coordinate a government-wide effort, as required by the Endangered Species Act of 1973, to identify all habitat under Federal jurisdiction or control

with each case, and requires consideration of the objectives of Congress in authorizing the project, the alternatives available to the agency, and the extent of losses that would be occasioned by various alternatives.

In short, the over-literal construction of the statute by the court of appeals was error. The district court properly construed it by a rule of reason, correctly detemining that it was not intended to prohibit the concluding stages of actions that TVA had already "authorized, funded, or carried out."

B. PRINCIPLES OF STATUTORY CONSTRUCTION, REFLECTED IN RELEVANT CASE LAW UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, ARE INCONSISTENT WITH APPLICATION OF THE ENDANGERED SPECIES ACT TO HALT A NEARLY FINISHED PROJECT

The construction that we urge is supported not only generally by a presumption against construing statutes to give them a retroactive effect, but specifically by decisions in analogous situations under the National Environmental Policy Act. As this Court stated in *United States Fidelity and Guaranty Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 314:

> The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to

that is critical to the survival and recovery of these species. The purpose of this program is to avoid the possibility that such habitats will be identified too late to affect federal project planning. Major projects now underway that are found to pose a serious threat to endangered species should be reassessed on a case-by-case basis.

> receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied.

While this is the first case that squarely presents the issue under the Endangered Species Act,[22] several courts have considered the analogous question under the National Environmental Policy Act. Applying the presumption against retroactivity, they have concluded that that Act was not intended to apply to projects at an advanced stage of construction when the Act was passed, even though the Act requires agencies to prepare an environmental impact statement in connection with all "major Federal actions significantly affecting the quality of the human environment * * *." 42 U.S.C. 4332(2)(C). As the court said in *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323, 1331 (C.A.4), certiorari denied *sub nom. Fugate* v. *Arlington Coaliton on Transportation*, 409 U.S. 1000:

> Doubtless Congress did not intend that all projects ongoing at the effective date of the Act be subject to the requirements of Section 102. At some stage of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be "possible" to change the project in accordance with Section 102. At some stage, federal action may be so "complete" that applying the Act could be considered a "retroactive" application not intended by the Congress.

See also *Ragland* v. *Mueller*, 460 F. 2d 1196 (C.A. 5); *Pizitz, Inc.* v. *Volpe*, 467 F. 2d 208 (C.A. 5); cf. *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412, 424 (C.A. 2), certiorari denied, 409 U.S. 849.[23]

[22] Other decisions under the Act, although not squarely addressing the issue, are consistent with our contention that the Act is to be reasonably construed and not to be retroactively applied in circumstances such as those presented here. In *National Wildlife Federation* v. *Coleman*, 529 F. 2d 359 (C.A. 5), certiorari denied *sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979, the court considered the application of Section 7 to a portion of an interstate highway that would transect the critical habitat of the Mississippi sandhill crane but that was not yet under construction. In holding that Section 7 applied and required the Secretary of Transportation to consider modifications of the proposed route, the court stated that another portion of the highway, which also transected the critical habitat, "is substantially complete and is not involved in this controversy," noting that "[c]onstruction of this portion of I-10 was initiated in advance of the passage of the Endangered Species Act of 1973" (529 F. 2d at 363 and n. 5). See also *Sierra Club* v. *Froehlke*, 534 F. 2d 1289, 1304-1305 (C.A. 8).

[23] Ordinarily the presumption against retroactive application requires that statutes not be applied to actions that have taken place before the statute was enacted, and the inquiry would therefore focus on the degree of the project's completion and the extent of unrecoverable commitments at the time of enactment. Even in terms of the degree of Tellico's completion (more than 50 percent) when the Endangered Species Act was passed, the court of appeals' decision works a retroactive application not intended by Congress. This is especially so since, as the district court found (Pet. App. B, p. 31A), the only alternative to completing the project is scrapping it. Applying the Act to scrap the project would have the effect of nullifying Congress's purpose in appropriating funds for seven years before the Act was passed.

In addition, application of a statute to a project may be retroactive in another sense. When an agency implements a project in a

Nothing in the language, design, or legislative history of the Endangered Species Act indicates that Congress intended the Act to apply retroactively to projects substantially completed when the Act became applicable to them.

C. THE LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT DOES NOT INDICATE AN INTENT TO HALT THE COMPLETION OF PROJECTS IN THE CIRCUMSTANCES OF THIS CASE

None of the committee reports or debates on the Endangered Species Act sheds clear light on the issues presented by this case.[24] There were, however, two relevant discussions.

One of them discloses that Senator Tunney, the Senate sponsor of the bill, believed that Section 7 of his bill, which was not materially different from Section 7 of the Act,[25] left to the responsible agency the

good-faith and reasonable belief that its actions have complied with existing law, and shortly before completion of the project events occur that invoke the statute (here, the Secretary's listing the snail darter as an endangered species and the portion of the river as its critical habitat), application of the statute takes place, and has a retroactive effect, at that time. The considerations underlying the general presumption against retroactive application also support the conclusion that the Endangered Species Act was not intended to halt projects when the threat to an endangered species comes to light in the final stages of the project's completion.

[24] See Report of the Senate Committee on Commerce, S. Rep. No. 93-307, 93d Cong., 1st Sess. (1973); Report of the House Committee on Merchant Marine and Fisheries, H.R. Rep. No. 93-412, 93d Cong., 1st Sess. (1973); H.R. Conf. Rep. No. 93-740, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. 25668-25700 (1973); 119 Cong. Rec. 30157-30175 (1973); 119 Cong. Rec. 42528-42535 (1973); 119 Cong. Rec. 42910-42916 (1973).

[25] Compare Section 7 of S. 1983, 93d Cong., 1st Sess. (set forth at 119 Cong. Rec. 25664 (1973)) with 16 U.S.C. (Supp. V) 1536.

decision whether a particular project should be constructed. On the Senate floor, Senator Cook asked whether the bill would apply to a road that the Corps of Engineers planned to build in Kentucky through a nesting area for wild turkeys. 119 Cong. Rec. 25689 (1973). Senator Tunney responded (119 Cong. Rec. 25689-25690 (1973)):

> * * * [A]s I understand it, after the consultation process took place, the Bureau of Public Roads, or the Corps of Engineers, would not be prohibited from building such a road if they deemed it necessary to do so.
>
> * * * [A]s I read the language, there has to be consultation. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built. That is my interpretation of the legislation at any rate.

In other words, Senator Tunney appears to have understood his bill as requiring agencies to consider the impact of their prospective actions on endangered species, and as requiring them to engage in the kind of balancing process mandated by the National Environmental Policy Act, but not as prohibiting them from constructing a project if, after such balancing, they concluded that the public interest warranted it. Under this view, *a fortiori* the Act would not automatically require the halting of a project that was substantially completed when the Act became applicable to it.

The other discussion indicates that Congressman Dingell, one of the supporters of the House bill, had

a somewhat different understanding of Section 7. In discussing a newspaper article concerning the effects on whooping cranes in Texas of Air Force bombing practices, Mr. Dingell stated:

> Under existing law, the Secretary of Defense has some discretion as to whether or not he will take the necessary action to see that this threat disappears. * * * [O]nce the bill is enacted, he or any subsequent Secretary of Defense would be required to take the necessary steps. [119 Cong. Rec. 42913 (1973).]

Mr. Dingell's remarks were addressed to circumstances where there would appear to be readily available alternatives to the action in question. That is not the situation here, where a project was substantially complete when the Act was invoked and where, as the district court found, "there are no alternatives to impoundment of the reservoir, short of scrapping the entire project" (Pet. App. B, p. 31A).

D. SUBSEQUENT CONGRESSIONAL ACTION CONFIRMS THAT THE ENDANGERED SPECIES ACT WAS NOT INTENDED TO HALT COMPLETION OF A PROJECT AS FAR ADVANCED AS TELLICO

Congress in 1975, 1976, and 1977, with full knowledge about Tellico's effect on the snail darter and the alleged violation of the Endangered Species Act that would result from the project's completion, appropriated money for the completion of the project. In doing so, the Appropriations Committees expressly stated their view that the Act did not prohibit the project's completion, a view that Congress presumably accepted in passing the appropriations. These

appropriations measures and their legislative history confirm our construction of the Act.

In 1975, 1976, and 1977, as we noted at pages 7–18, *supra*, TVA fully informed appropriations subcommittees of both Houses about the snail darter, about claims that completion of the project would destroy its habitat in violation of the Endangered Species Act, and about TVA's view that while it was doing its best to preserve the fish, "the project should be completed in any event."

Possessed of this information, the House Appropriations Committee in 1975, and the Senate Appropriations Committee in 1976, directed in their reports that the project "be completed as promptly as possible * * * in the public interest." The 1976 report of the Senate Committee explicitly stated, moreover, that "[t]he Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage * * * " (see p. 10, *supra*).

And in 1977, after being informed of the court of appeals' decision halting the project, both the House and Senate Committees declared it their view that the Act was not intended to halt projects such as Tellico and recommended further appropriations to complete the project.[26] The House Report also recommended

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[26] The 1977 Report of the House Appropriations Committee stated (see p. 15, *supra*): "It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion * * *." The 1977 Report of the Senate Appropriations Committee stated (see p. 16, *supra*): "This Committee has not viewed the Endangered Species Act as preventing the completion and

additional funds—which were appropriated—for relocation of the snail darter "rather than delay or stoppage of projects." Moreover, the House floor manager of the appropriations bill pointed out during that chamber's consideration of the legislation that the snail darter was an "endangered species that now threaten[s] the completion of * * * the Tellico Dam" (*supra*, p. 17).

In all three years, Congress followed the Committees' recommendations and appropriated the requested funds.

While this Court has held that statements by individual Congressmen concerning the meaning of an earlier statute are not significant (see, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132), it has also held that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction" (*Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380–381).[27] To be sure, here the intent was declared not by the subsequent legislation itself (except for the 1977 appropriations Act),[28] but by

use of these projects which were well under way at the time the affected species were listed as endangered." The Committee added: "If the act has such an effect, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding" (*ibid.*).

[27] See also *Adamo Wrecking Co.* v. *United States*, No. 76-911, decided January 10, 1978, slip op. 12–13.

[28] The appropriations Act passed in 1977 (see pp. 17–18, *supra*) stated that $2,000,000 was being appropriated "to carry out the

committee reports recommending the legislation. In the circumstances, however, the enactment of the appropriations would have been futile unless Congress as a whole agreed with the committees that completion of the Tellico project was not barred by the earlier Act (or unless Congress intended to modify that Act if it did bar the project, an alternative discussed in Part II, *infra*).

Moreover, in contexts comparable to those presented here, the Court has recognized that the subsequent appropriations Acts themselves are entitled to significant weight in determining Congress's original intent. In *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, the Court upheld the statutory authority of the President to transfer the functions of the Office of Price Administration to another agency on the ground, among others, that "the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the action of the Chief Executive."

In *Brooks* v. *Dewar*, 313 U.S. 354, the Court upheld the statutory authority of the Secretary of the Interior to grant temporary grazing licenses and collect fees for them, on the ground that Congress, with knowledge of the Secretary's practice, had repeatedly appropriated funds for the purposes of the statute from the revenues received from the fees. "The repeated appropriations of the proceeds of the fees * * *

purposes of the Endangered Species Act of 1973 * * *, including cooperative efforts as contemplated by that Act to relocate endangered or threatened species to other suitable habitats as may be necessary to expedite project construction." (See p. 18, *supra*.)

not only confirms the departmental construction of the statute, but constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act" (313 U.S. at 361).

Congress here, in repeatedly appropriating funds to complete the Tellico project, indicated by its Acts and expressly stated by its committee reports its agreement with TVA that the Endangered Species Act was not intended to halt Tellico or similar projects. If that expression is not legally conclusive, it is at least entitled to considerable weight in construing the Act, and it confirms the construction on which we rely.

II

EVEN IF SECTION 7 OF THE ENDANGERED SPECIES ACT WERE OTHERWISE CONSTRUED AS PROHIBITING COMPLETION OF THE TELLICO PROJECT, CONGRESS, IN APPROPRIATING FUNDS TO COMPLETE THE PROJECT WITH FULL KNOWLEDGE OF ITS ADVERSE EFFECT ON THE SNAIL DARTER AND ITS ASSERTED VIOLATION OF THE ACT, DIRECTED THAT THE PROJECT BE COMPLETED NOTWITHSTANDING THOSE CONSIDERATIONS

We have argued in Part I that the Endangered Species Act, properly construed, does not prohibit completion of the Tellico project. If the Court agrees, it is unnecessary to reach any other issue in the case. But if the Court disagrees with our construction of the Act, there is an alternative basis for reversing the court of appeals' judgment: The subsequent appropriations measures enacted by Congress constituted, in the particular circumstances of this case, a legislative determination exempting this project from the effect of the Endangered Species Act.

As a general principle, courts ordinarily should not infer from appropriations Acts an intent by Congress to repeal or modify substantive law. The doctrine disfavoring repeals by implication "applies with full vigor when * * * the subsequent legislation is an appropriations measure * * *." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F. 2d 783, 785 (C.A. D.C.). With full respect for this principle, we submit that in the particular and unusual circumstances of this case, Congress, through its appropriations Acts, made a legislative determination that this project should be completed whether or not the Endangered Species Act would otherwise prohibit its completion.

The function of courts in construing legislation is to carry out the will of Congress as best it can be ascertained. That Congress's intent may not be readily apparent, or that the evidence bearing on it may be in conflict, does not remove the need to decide what the intent was. For this purpose courts may consider all available and relevant materials. The inquiry in each case requires consideration and weighing of the totality of the available evidence, with due regard to all the circumstances affecting its probative value. As Chief Justice Marshall said in *United States* v. *Fisher,* 2 Cranch 358, 386:

> Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; * * *.

See also *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10; *United States* v. *American Trucking Assns., Inc.*, 310 U.S. 534, 543–544; *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 389. Materials derived from appropriations legislation are among the evidence that may be considered. See *United States* v. *Dickerson*, 310 U.S. 554; *Friends of the Earth* v. *Armstrong*, 485 F. 2d 1 (C.A. 10) (*en banc*), certiorari denied, 414 U.S. 1171; *City of Los Angeles* v. *Adams*, 556 F. 2d 40 (C.A. D.C.)

Three principal considerations, which are distinctive to this case, bear on the question of Congress's intent with respect to the Tellico project: first, the conflict between the effect of the Endangered Species Act, as construed by respondents and the court of appeals, and the enactment and purpose of congressional appropriations made with knowledge of that asserted effect; second, the specific indications of Congress's intent contained in the legislative history of the appropriations Acts and in one case in the Act itself; and third, the use by Congress of appropriations legislation to manifest its intent. The totality of the evidence, assessed in the light of these considerations, evinces a legislative determination that this particular project should be completed as quickly as possible whether or not its completion would otherwise contravene the Endangered Species Act.

A. THE APPLICATION TO THE TELLICO PROJECT OF THE ENDANGERED SPECIES ACT, AS CONSTRUED BY THE COURT OF APPEALS, IS IN DIRECT CONFLICT WITH THE PURPOSE OF CONGRESSIONAL APPROPRIATIONS FOR THE PROJECT SUBSEQUENT TO PASSAGE OF THE ACT

Given the interpretation of the Endangered Species Act by the court of appeals, this case, in contrast to most others, presents an irreconcilable conflict between different congressional statutes as construed and applied to the facts presented. This circumstance forecloses the possibility of giving full effect to the congressional purposes reflected in both statutes. It requires a choice to be made.

Respondents have contended, and the court of appeals agreed, that completion of the Tellico project by impoundment of the reservoir is implacably prohibited by the Endangered Species Act. It will remain prohibited, under this interpretation of the Act, as long as the snail darter is listed as an endangered species and the portion of the river proposed to be impounded is listed as a critical habitat of the species. Even a successful transplanting of the fish to another river would not lift the prohibition, if the original habitat continued to be a "critical habitat." [29]

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[29] The Act does not define "critical habitat," but regulations promulgated by the Secretary of the Interior define the term as (50 C.F.R. 402.02, 43 Fed. Reg. 874–875):

> [A]ny * * * area * * * the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. * * * Critical habitat may represent any portion of the present habitat of a listed species * * *.

Thus, even if some snail darters were successfully transplanted to another river, their original habitat might not cease to be "critical," at least for "a distinct segment of [their] population."

After enactment of the Endangered Species Act and after the listing of the snail darter as an endangered species, Congress, with knowledge of the Tellico project's effect on the snail darter, passed appropriations Acts for the express purpose of completing the Tellico project. The manifest intent of these appropriations was that the project be completed and utilized notwithstanding its effect on this fish. It is not reasonable to assume that Congress would appropriate money to finish a project that could never be used.

Thus, with respect to this project, the purpose of the appropriations legislation is in direct conflict with what the court of appeals believed to be the intent and effect of the Endangered Species Act. Whether or not the fact of appropriations, standing alone, would be dispositive of the question of intent, the court of appeals erred in disregarding the appropriations legislation altogether on the basis of the canon that repeals by implication are disfavored (Pet. App. A, p. 16A).

Repeals by implication are indeed disfavored, and

> the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.* * *
>
> * * * [W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. * * *

Morton v. *Mancari,* 417 U.S. 535, 550–551. "The principle carries special weight when we are urged to

so long as the species remained sufficiently small in number to remain "endangered."

find that a specific statute has been repealed by a more general one." *United States* v. *United Continental Tuna Corp.,* 425 U.S. 164, 169.

But this case, given the ruling of the court of appeals, is precisely a case where "the earlier and later statutes are irreconcilable." Moreover, this is not a case where a general statute is claimed to work an implicit repeal of a more specific one, but a case where specific statutes implicitly exempt a particular project from the claimed operation of a prior general statute. Thus, in *Muniz* v. *Hoffman,* 422 U.S. 454, 458, the Court stated, "it is not unusual that exceptions to the applicability of a statute's otherwise all-inclusive language are not contained in the enactment itself but are found in another statute dealing with particular situations to which the first statute might otherwise apply." [30]

The circumstances of this case are also substantially different from those presented where appropriations for projects are claimed to implicitly exempt those projects from general statutes—including most forms of environmental legislation—that impose requirements with respect to the manner in which a project is carried out but do not prohibit the project. The National Environmental Policy Act (NEPA), 42 U.S.C. 4332, for example, requires agencies to consider, and prepare a detailed statement on, the en-

[30] In such circumstances, some of the usual considerations militating against repeal by implication are not present. See *United States* v. *United Continental Tuna Corp., supra,* 425 U.S. at 169. The very specificity of the subsequent statutes tends to show that Congress contemplated and intended their particular consequences.

vironmental impact of proposed actions. But in contrast to the Endangered Species Act as construed by the court of appeals, NEPA leaves to the agency the final determination of whether the benefits of a project justify its implementation despite adverse effects on the environment (see, *e.g., Environmental Defense Fund, Inc.* v. *Armstrong,* 487 F. 2d 814 (C.A. 9), certiorari denied, 416 U.S. 974).

Thus there is no conflict between continued appropriations for a project and the general requirement that the agency consider and prepare a statement detailing the environmental impacts; and there would ordinarily be no basis for concluding that appropriations Acts were intended to exempt the project from the general commands of the prior law. See, *e.g., Environmental Defense Fund, Inc.* v. *Froehlke,* 473 F. 2d 346, 455 (C.A. 8); *Environmental Defense Fund* v. *Tennessee Valley Authority,* 468 F. 2d 1164, 1182 (C.A. 6); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F. 2d 783, 785 (C.A. D.C.). The same would be true of most statutes imposing general requirements with respect to the manner in which agencies implement their programs, such as requirements concerning equal opportunity practices or procedural mechanisms.

In this case, however, if the Endangered Species Act has the intent and effect the court of appeals accorded to it, the basic purpose of subsequent appropriations legislation will necessarily be frustrated. At the least, this conflict warrants consideration of the

subsequent legislation and examination of all the evidence bearing on Congress's intent.

B. THE APPROPRIATIONS ACTS AND THEIR LEGISLATIVE HISTORY REFLECT CONGRESS'S INTENT THAT THE TELLICO PROJECT BE COMPLETED AS QUICKLY AS POSSIBLE NOTWITHSTANDING THE ENDANGERED SPECIES ACT

As we have noted (see pp. 7–18, *supra*), appropriations to complete the Tellico project were enacted for three successive years after the listing of the snail darter as an endangered species, and committee reports for the last two years expressed the view that the Endangered Species Act was not intended to halt construction of projects such as this one. In addition, the 1977 Senate Report, issued after the court of appeals decision, stated that "funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, *the Endangered Species Act notwithstanding*" (emphasis supplied).

While the court of appeals did not, of course, consider the legislative history of the 1977 appropriations Acts, it dismissed the legislative history of the 1975 and 1976 Acts on the ground not only that repeals by implication are disfavored (see pp. 42–43, *supra*), but also that the statements in committee reports were merely "advisory opinions" with respect to the meaning of the Endangered Species Act (Pet. App. A, p. 15A). But those statements were not expressions of personal opinion by individual legislators of the

kind that this Court has found unpersuasive as evidence of Congress's intent in passing a prior statute. See *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132. They were statements in committee reports recommending specific legislation for a specific purpose, and Congress enacted that legislation. They therefore merit considerable weight as indications of the congressional intent embodied in the legislation.

It is particularly significant, moreover, that the 1977 House Committee Report recommended, *and the 1977 Appropriations Act expressly provided,* a special appropriation of $2 million to TVA that was designed, in the words of the Act, "to carry out the purposes of the Endangered Species Act of 1973 * * *, including cooperative efforts as contemplated by that Act to relocate endangered or threatened species to other suitable habitats as may be necessary to expedite project construction" (see pp. 15–16, 18, *supra*). If there could be any doubt, the House Committee Report and the statement on the floor by Congressman Bevill (see pp. 15–18, *supra*) make it clear that a major and specific purpose of this relocation program was to resolve the conflict between the Tellico project and the snail darter. The 1977 appropriations Act thus constitutes, as expressed in the language of the statute itself, an enactment designed to provide an alternative, legislative solution to the impasse created by the court of appeals' decision, a solution based on relocating the endangered species rather than scrapping the nearly completed project.

C. THE USE BY CONGRESS OF APPROPRIATIONS LEGISLATION TO MANIFEST ITS INTENT WITH RESPECT TO TELLICO AND THE NEED FOR RECOURSE TO THE LEGISLATIVE HISTORY TO ESTABLISH THAT INTENT ARE CONSISTENT WITH THE CONCLUSION THAT CONGRESS INTENDED TELLICO TO BE COMPLETED AND UTILIZED NOTWITHSTANDING THE ENDANGERED SPECIES ACT

Congress acted in this case by appropriations legislation, and it is not in the text of the statutes—with the significant exception of the 1977 appropriations Act—but rather in their legislative history that the intent with respect to Tellico is stated. The court below reasoned that "Congress must be free to appropriate funds for public works projects with the expectation that resulting executive action will pass judicial muster" (Pet. App. A, p. 16A), and pointed to "the danger of bypassing plenary [congressional] consideration of proposed modification to existing laws by adding amendments to appropriations bills" (*ibid.*). As we have noted (p. 39, *supra*), appropriations measures should not ordinarily be construed as repealing or modifying substantive law.

The considerations against inferring such an intent from appropriations measures are reflected in decisions such as *Environmental Defense Fund, Inc.* v. *Froehlke, supra,* 473 F. 2d at 455; and *Committee for Nuclear Responsibility* v. *Seaborg, supra,* 463 F. 2d at 785. The argument is that if appropriations legislation is taken as modifying substantive law, it will be possible to amend or repeal substantive statutes in ways that do not truly reflect the intent of a majority

of the Congress. This may be so, it is argued, either because the Congress as a whole does not devote as much attention to appropriations measures as to substantive legislation, or because the modifying or repealing impact of appropriations measures often will be indicated only in the legislative history and therefore is less likely to be considered by all legislators. For reasons such as these, both Houses of Congress have adopted internal rules designed to assure their members that when they approve appropriations measures, they will not be unknowingly changing existing law (see note 34, *infra*).[31] Thus, the argument would conclude, appropriations measures should not be considered to change existing law, or, at least, any such change must be expressed on the face of the appropriations statute.

But where, as here, the particular circumstances indicate that Congress did intend to change or override pre-existing law, the courts must give effect to that intent. Decisions of this Court and other courts establish that when appropriations measures and other statutes appear to have conflicting purposes, it is permissible and appropriate to go behind the face of the statutes to their legislative history, including the legislative history of the appropriations measures, to discern the congressional will.

The leading decision on the question is *United States* v. *Dickerson, supra,* 310 U.S. 554. A 1922 stat-

[31] In addition, the President's veto power is arguably impaired by the difficulty of vetoing an entire appropriations Act in order to reject a single appropriation that modifies substantive law.

ute authorized and directed the payment of bonuses to servicemen who reenlisted. In 1938 Congress passed a rider to the appropriations bill for the Rural Electrification Administration providing that "'no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment' of any enlistment allowance for 're-enlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of [the 1922 Act].'" 310 U.S. at 555. The 1938 appropriations measure did not expressly repeal the right to bonuses conferred by the 1922 statute for the 1939 fiscal year; the Court of Claims held, in fact, that it merely "restricted the funds available for payment of the allowance * * *" (310 U.S. at 555).

But this Court reversed. The Court concluded, on the basis of the appropriations Act's legislative history, that it was intended to suspend the right to bonuses for that year. The Court brushed aside the claimant's contention that the words of the Act "are plain and unambiguous and that other aids to construction may not be utilized" (310 U.S. at 561), stating (*id.* at 562; footnote omitted):

> The very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. * * * The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.

Similarly, in *United States* v. *Mitchell,* 109 U.S. 146, the Court concluded that appropriations statutes appropriating $300 per year for the salaries of certain employees evinced an intent to supersede a prior statute declaring and authorizing salaries of $500 and $400 per year for those employees. See also *Dunwoody* v. *United States,* 143 U.S. 578; compare *United States* v. *Vulte,* 233 U.S. 509; *United States* v. *Langston,* 118 U.S. 389.

Similar results have been reached in several court of appeals decisions involving appropriations legislation. In *Friends of the Earth* v. *Armstrong,* 485 F. 2d 1 (C.A. 10), certiorari denied, 414 U.S. 1171, the court concluded that a 1962 appropriations Act providing that "no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell [a reservoir created by the Glen Canyon Dam] from entering any National Monument" repealed a 1956 statutory provision expressly prohibiting waters of the reservoir from entering any national park or monument (485 F. 2d at 7–8). The appropriations statute did not expressly repeal the 1956 prohibition, or even refer to it, but the court concluded from its legislative history that that was its intent and effect.

A more recent case, *City of Los Angeles* v. *Adams,* 556 F. 2d 40 (C.A. D.C.), involved a 1970 statute that established an airport development program and authorized and directed the Secretary of Transportation to make grants in each the next five years of "not less than" specified amounts for each year. Appropriations Acts in the following years, however, imposed limitations on the amount of appropriated funds that could be made available for airport development, limitations that in several years were lower than the minimum amount specified in the 1970 statute. The court, referring to the legislative history, concluded that the intent of the appropriations measures was to modify the amounts that the authorizing statute authorized and directed to be spent, stating (556 F. 2d at 48–49; footnotes omitted):

> According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws, including revision of expenditure authorization. In general, the doctrine disfavoring repeals by implication is said to apply "with full vigor" when the subsequent law is an appropriations measure. Where Congress chooses to do so, however, we are bound to follow Congress's last word on the matter even in an appropriations law.

See also *Eisenberg* v. *Corning,* 179 F. 2d 275 (C.A. D.C.); *Tayloe* v. *Kjaer,* 171 F. 2d 343 (C.A. D.C); compare *New York Airways, Inc* v. *United States,* 369 F. 2d 743 (Ct. Cl.).

Dickerson and the other cases cannot be distinguished from this case on the ground that TVA's appropriations Acts do not on their face state an intent to modify existing law, that intent being expressed only in the legislative history. Nothing on the face of the statutes considered in *Dickerson* or the other cases stated an intent to modify existing

law;[32] the courts in each case were required to discern that intent from the legislative history.

In *Dickerson, Armstrong,* and *City of Los Angeles,* the appropriations Acts did contain language relevant to the conflict with the prior statute. But in affirmatively appropriating money for completion of the Tellico project, TVA's appropriations Acts seem more squarely in conflict with the Endangered Species Act, as interpreted to prohibit completion of that project, than were the appropriations measures in *Dickerson, Amstrong,* and *City of Los Angeles* that on their face only denied or limited appropriations.[33] In any event, consideration of legislative history to determine Congress's intent in passing a statute is appropriate "however clear the words [of the statute] may appear on 'superficial examination'." *United States* v. *Ameri-*

[32] In *Dickerson* the language of the appropriations Act made no such statement, even though it did refer to the earlier statute, because it is well established that when a statute creates a vested right to money, that right is enforceable regardless of Congress's subsequent failure to appropriate funds for the purpose. See, *e.g.*, *United States* v. *Vulte*, *supra*, 233 U.S. 509; *New York Airways, Inc.* v. *United States*, *supra*, 369 F. 2d at 748; cf. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 570–571. Appropriations statutes that limit or prohibit the expenditure of funds for a purpose previously authorized therefore do not necessarily evince a purpose inconsistent with the prior substantive directive. This was the basis of the ruling for the *Dickerson* claimant by the Court of Claims, which held that the appropriations Act only restricted the funds available for payment of the allowance (see 310 U.S. at 555; 89 Ct. Cl. 520). It was only by extensive resort to the legislative history that this Court determined in *Dickerson* that Congress intended by the appropriations Act to suspend the basic right to the payments (see 310 U.S. at 556–562).

[33] See note 32, *supra.*

can Trucking Assns., Inc., supra, 310 U.S. at 544; see also *Train* v. *Colorado Public Interest Research Group, Inc., supra,* 426 U.S. at 10; *Cass* v. *United States,* 417 U.S. 72, 77–79.

In this case, Congress's intent with respect to Tellico is set forth in committee reports of both Houses for three successive years. This Court has recognized that statements in committee reports on enacted legislation are entitled to considerable weight in discerning the congressional will embodied in that legislation. *E.g., United States* v. *International Union United Automobile, Aircraft and Agricultural Implement Workers of America,* 352 U.S. 567, 585.[34] The rationale of this view is that these are the documents that most members of Congress are likely to consider in voting on the legislation. The appropriations committee reports involved in this case are significant for

[34] There is no basis for supposing that appropriations committee reports reflect the will of Congress any less than reports of other committees.

The existence in both Houses of Congress of rules concerning amendments to existing law through appropriations measures (see p. 48, *supra*) does not affect the result here. Rules of the House of Representatives, Rule XXI, ¶ 2, 94th Cong. (1975), which provides that no appropriations bill "changing existing law [shall] be in order," permits a point of order to be raised and sustained with respect to appropriations legislation that changes existing law. It does not mean that appropriations legislation changing existing law is not effective when, as in this case and in *Dickerson*, *supra*, 310 U.S. at 558, n. 2, no point of order was raised. Senate Manual, Standing Rule XVI, ¶ 4, 94th Cong., 1st Sess. (1975), prohibits amendments "propos[ing] general legislation" to "be received to any general appropriation[s] bill." No such amendment is involved in this case, which concerns the intent of the appropriations legislation itself.

the same reason. The committee reports on legislation appropriating funds for completion of the Tellico project state an intent that the project be completed and utilized, its effect on the snail darter and its alleged violation of the Endangered Species Act notwithstanding. The clear weight of the legislative evidence, after considering all the factors bearing on its probative value, is that this was the will of Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.[35]

Respectfully submitted.

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[35] The Secretary of the Interior has differing views on this case and presents them in the Appendix that follows.

* The Solicitor General is disqualified in this case.

APPENDIX

VIEWS OF THE SECRETARY OF THE INTERIOR

The Secretary of the Interior disagrees with petitioner's legal conclusion in this brief and has been authorized to present his views in this Appendix.

The Secretary of the Interior has the responsibility for implementing the Endangered Species Act and has promulgated final regulations thereunder. 50 C.F.R. section 402 (43 Fed. Reg. 870 (January 4, 1978)). The Department of the Interior's (and the National Marine Fisheries Service's) recent regulations, in section 402.03, expressly apply to previously initiated projects where Federal involvement or control remains. Petitioner's arguments on implied exemption and retroactive application of the Act, if adopted, would substantially undermine these regulations.

This case presents policy issues far broader and more significant than whether a 3-inch endangered fish should prevail over a 70-foot dam. Beyond taking a position that would result in the extirpation of an endangered species, petitioner would have this court disregard (1) the plain terms of the Endangered Species Act of 1973, (2) the policy behind House Rule XXI, (3) the common law rule against repeals by implication, and (4) the hostility of the Courts to the doctrine of legislation by appropriation.

For the reasons that follow, the Secretary of the Interior believes that the court of appeals decided this case correctly.

I

PETITIONER HAS NOT COMPLIED WITH SECTION 7 OF THE ENDANGERED SPECIES ACT OF 1973

Petitioner argues that Section 7 of the Act does not prohibit completion of projects like Tellico that were 50–75 percent completed when the Endangered Species Act was enacted and an endangered species was discovered and listed by the Secretary of the Interior.

This argument is contrary to congressional intent in enacting the Endangered Species Act and is not supported by applicable court decisions. If adopted, petitioner's argument would have serious policy implications.

The court below correctly interpreted congressional intent in the application of Section 7 to on-going projects, quoting from *Environmental Defense Fund* v. *Tennessee Valley Authority,* 468 F.2d 1164, 1176 (C.A. 6):

> . . . Congress envisaged ongoing agency attempts to minimize environmental harm caused by the implementation of agency programs. This could encompass not only *constant reevaluations of projects already begun* to determine whether alterations can be made in existing features or whether there are alternatives to proceeding with the projects as initially planned, but also the consideration of the environmental impact of all *proposed* agency action. *Hill* v. *Tennessee Valley Authority,* 549 F.2d 1064, 1072 (C.A. 6). [Emphasis in the original]

The NEPA cases cited by petitioner to support, by analogy, an exemption for Tellico Dam based on its degree of completion are simply not on point. In those cases, unlike this case, no viable alternatives

existed enabling meaningful application of the National Environmental Policy Act's environmental impact statement requirement.

Petitioner now refuses to look into a reasonable alternative that would both promote the economic and regional development objectives originally authorized by Congress and enable compliance with the Endangered Species Act. In his recent report to Congress, the Comptroller General studied the Tellico Project, its costs, alternatives and benefits. The Comptroller General concluded that a comprehensive river-based regional development project, which promotes intensive use of some 16,500 acres of valuable agricultural land, provides recreational benefits, offers industrial development potential, and preserves historical, cultural and wildlife resources (including the endangered snail darter) may be a viable alternative to closure of Tellico Dam, but that TVA now refuses to explore it. *"Report To The Congress—The Tennessee Valley Authority's Tellico Dam Project: Costs, Alternatives and Benefits",* Comptroller General of the United States, EMO–77–58 (October 14, 1977) pp. 37–40 (hereafter cited as GAO Report).[1] GAO concluded that TVA might both satisfy the project's development objectives and comply with the Endangered Species Act:

> We recommend that . . . TVA gather and provide to Congress . . . detailed remaining cost and remaining benefit information on the Tellico Project and its alternatives . . . [I]ni-

[1] It would be wrong to conclude that abandonment of the Tellico Project would entail a total loss of project values. The GAO report on this project indicates that, depending on land-use choices, about $56.3 million of project costs could provide benefits for alternative uses. GAO Report, *supra,* page 5.

tial suggestions on developing alternatives, and subsequent comments on the methodologies, data bases, and resulting analyses should be obtained from the Director of the Office of Management and Budget, the Chairman of the Council on Environmental Quality, and the Secretary of the Interior . . .

Congress would have before it, for the first time, a current detailed projection . . . for . . . the proposed reservoir project *and a comprehensive river-based regional development project* offering such opportunities as recreation, agriculture and historical, cultural, and industrial development. [GAO Report, *supra,* at iii, 38, 40–41. (Emphasis added).]

The fact that a viable alternative to the Tellico Dam *reservoir* project is also an alternative for preservation of the snail darter, suggests a basis for resolving this controversy administratively by remanding this case to the trial court to require petitioner to comply fully with the "consultation" requirements of Section 7 of the Endangered Species Act.

Section 7 of the Endangered Species Act, as applied to on-going projects, was intended to insure a rigorous examination of alternatives in the event completion of a project would extirpate a listed endangered species. TVA's exemption under the facts of this case would, if adopted, encourage and allow agencies to resist compliance with Section 7's "consultation" requirement, avoid careful examination of alternatives, and spend additional funds towards completion until the agency could argue that it is economically unreasonable to halt the project. Petitioner's exemption arguments, if adopted, would preclude the successful effort to resolve conflicts between construction projects and the Endangered Species Act by administrative rather than judicial means.

The Department of the Interior and the Council on Environmental Quality testified at oversight hearings on the Endangered Species Act before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works on July 20, 1977. (Preprint pp. 95–112, Serial 95–H33 (January 1978)). The Administration's position was that the Endangered Species Act was working successfully and did not require amendments. Over 4500 successful "consultations" pursuant to Section 7 of the Endangered Species Act have occurred. Although three cases have resulted in litigation, in only one instance—this case—has the Section 7 "consultation" arrived at an impasse. As was related to Congress, it is the Administration's position that Section 7 "consultation" can successfully resolve conflicts if pursued as contemplated by the Act. The Secretary of the Interior submits that the Endangered Species Act is not unworkable or inflexible in the circumstances presented in this case.

Petitioner's arguments for exempting on-going projects from Section 7 based on the facts in this case would, if adopted, set a dangerous precedent for agencies to exempt their on-going projects from compliance with other "consultation" laws such as the Historic Preservation Act of 1966, 16 U.S.C. Section 470 (1970). That Act requires agencies to consult with the Advisory Council on Historic Preservation in cases where a proposed project may cause adverse effects on historical, cultural and archaeological resources that are in the National Register or are eligible for the National Register.

In short, petitioner's exemption arguments would, if adopted, undermine the effective implementation of Section 7 of the Endangered Species Act and related legislative requirements.

II

THE CONGRESS DID NOT LEGISLATE BY APPROPRIATION AN EXEMPTION OF THE TELLICO DAM PROJECT FROM THE ENDANGERED SPECIES ACT OF 1973

Petitioner argues that Congress, in appropriating funds to complete the Tellico project, intended to exempt that project from the effect of the Endangered Species Act. In reaching this position, petitioner is forced to rely on a theory of "exemption by the appropriations committee", since the appropriations acts did not create the exemption contended for.

The principal cases relied upon by petitioner in support of its legislation by appropriation argument do not hold that an exemption may be claimed to flow from an appropriation statute which is *entirely silent* on the subject matter of the exemption. *United States* v. *Dickerson,* 310 U.S. 554, involved a 1922 statute authorizing and directing the payment of bonuses to servicemen who re-enlisted. In 1938, Congress passed a rider to the appropriations bill for the Rural Electrification Administration providing that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939 shall be available for the payment [of re-enlistment bonuses] for re-enlistments made during the fiscal year ending June 30, 1939, *notwithstanding the applicable portions of* [*the 1922 Act*]" (emphasis added). The Court correctly concluded that the language *in the appropriations statute* (aided by the legislative history) was intended to suspend the application of the 1922 re-enlistment bonus provisions for that year. Unlike *U.S.* v. *Dickerson,* in this case the appropriations bills contain no specific language indicating a comparable Congressional intent to suspend application of the Endangered Species Act to the Tellico Project.

Friends of the Earth v. *Armstrong,* 485 F.2d 1 (C.A. 10) involved several statutes authorizing construction of the Colorado River Basin Project, including Glen Canyon Dam. The first statute, enacted in 1956, contemplated that waters from the resulting Lake Powell had the physical potential of penetrating into Rainbow Bridge National Monument and specified in Section 1 that ". . . the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument." The same statute also provided in Section 3, however, that Congress did not intend any dam or reservoir project to be "within" any national park or monument. A later statute enacted in 1962 provided that Lake Powell *be operated at maximum capacity,* which meant that its waters would in fact penetrate Rainbow Bridge National Monument. In analyzing whether this statutory scheme was intended to prevent any waters from entering into Rainbow Bridge National Monument, the Court construed the language in the 1956 and 1962 statutes, together with express refusals and prohibitions by Congress to fund protective works for that Monument, as a repeal of Sections 1 and 3 of the 1956 statutes. The court said ". . . [I]n the case before us, the . . . explanations in the committee reports *and in the legislation itself* compel us to say that the provisions (Sections 1 and 3) in the Storage Act were repealed", and "[t]his is thus not really a situation of repeal by implication." *Friends of the Earth* v. *Armstrong,* 485 F.2d 1, 9 (C.A. 10) (emphasis added).

Petitioner's reliance upon *City of Los Angeles* v. *Adams,* 556 F.2d 40 (C.A.D.C.), is similarly misplaced. There, language in appropriations statutes restricting the use of funds authorized by previous law was held controlling. Thus, in *U.S.* v. *Dickerson,*

Friends of the Earth v. *Armstrong* and *City of Los Angeles* v. *Adams*, the repeal or amendment of the statutory requirements was found in the language of the statutes themselves *together with* Congressional expressions in committee reports. The repeals and amendments were *not* found solely in the fact that Congress appropriated funds for continued construction of the project or solely in expressions of Congressional intent found in the appropriations committee reports.

This point was recently made by the Court in *Sierra Club* v. *Morton*, 400 F. Supp. 610, 638 at n. 42 (N.D. Cal.):

> [D]efendants' reliance upon *Friends of the Earth* v. *Armstrong*, 485 F.2d 1 (10th Cir. 1973) (en banc), *cert. denied* 414 U.S. 1171 (1974) is misplaced. There, congressional intent was quite explicit both on the face of the acts in question and in the accompanying legislative history. Similarly, in *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940), the Court held that Congress could suspend certain provisions of a prior act (military re-enlistment allowances) through an amendment to an appropriation bill. However, in that case congressional *intent was manifestly clear from both the language of the Act and the legislative history.*

We do not contend, nor do we understand the court of appeals to hold, that express words of exemption must appear on the face of the appropriations statute. Nor do we understand the court of appeals to hold that repeals must be enacted by specific reference to the statute from which exemption is sought. However we have found no case in which a repeal or exemption was held to flow from a statute which is silent on the subject matter. To the extent that any general rule can be derived from cases involving argued exemptions

from substantive requirements of other law,[7] it is that implied exemption by appropriation is strongly disfavored and will only be held to occur when the statute itself, together with its legislative history, manifests a consciousness of the requested exemption and a clear intention to grant it.[8] Courts have traditionally been less sympathetic to implied exemptions in cases where the questioned administrative actions are prohibited by other law.[9]

If appropriations committee reports could create statutory exemptions to the Endangered Species Act, the reports in this case do not contain clear evidence of such committee intent. Rather, the reports are replete with statements by TVA and the committees expressing the desire that the transplanting efforts be successful in order that the endangered fish will survive.

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[7] *Friends of the Earth* v. *Armstrong*, *supra.*; *United States* v. *Dickerson*, *supra.*; *Committee For Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 783, 785 (C.A.D.C.); *Environmental Defense Fund* v. *Froehlke*, 473 F. 2d 346, 354 (C.A. 8); *D.C. Federation of Civic Associations, Inc.* v. *Airis*, 391 F.2d 478 (C.A.D.C.); *Arizona Power Pooling Association* v. *Morton*, 527 F.2d 721 (C.A. 9), *cert. denied*, 425 U.S. 911 (1976); *City of Santa Clara* v. *Kleppe*, 418 F. Supp. 1243 (N.D. Cal.); *Associated Electrical Cooperative, Inc.* v. *Morton*, 507 F.2d 1167 (C.A.D.C.), *cert. denied*, 423 U.S. 830; *Ex parte Endo*, 323 U.S. 283 (1944); *National Wildlife Federation* v. *Andrus*, 10 E.R.C. 1353, 1360 (D.D.C.).

[8] *Atchison, Topeka & Santa Fe Rwy. Co.* v. *Summerfield*, 229 F.2d 782 (C.A.D.C.), *cert. denied*, 351 U.S. 926 (1956); *Isbrantsen-Moller Co.* v. *United States*, 300 U.S. 139, 146–147; *Ivanhoe* v. *McCracken*, 357 U.S. 275, 293–94; *Environmental Defense Fund* v. *Corps of Engineers*, 492 F.2d 1123, 1140–1141 (C.A. 5); *United States* v. *Kennedy*, 278 F.2d 1121 (C.A. 9); *Compare: Maun* v. *United States*, 347 F.2d 970, 978 (C.A. 9); *Thompson* v. *Clifford*, 408 F.2d 154, 166 (C.A.D.C.).

The 1977 appropriations act best exemplifies this uncertainty. While the reports indicate an intent that the Endangered Species Act should not prevent the completion and utilization of the project, the appropriations act contains specific language requiring that the purposes of the Endangered Species Act be carried out. (S. Rep. No. 95–301, 95th Cong., 1st Sess. 7, 98 (1977); H.R. Rep. No. 95–379, 95th Cong., 1st Sess. 103 (1977); Pub. L. No. 95–96, 91 Stat. 797 (1977)). Since closing the dam and filling the reservoir would immediately make transplantation efforts impossible, it follows that Congress specifically contemplated in the appropriations act itself that dam closure must await evidence of a successful transplant.

The June 20, 1975 House Appropriations Committee Report first relied upon by petitioner says nothing about the Endangered Species Act.[4] The snail darter had not even been listed as an endangered species at that point, so the Act did not then apply and it would be a tenuous process of implication to suggest that the Committee intended to exempt the Tellico Project from an Act which did not even apply at the time. No greater implied intent could be attributed to the Congress as a whole from such evidence.

The June 17, 1976, Senate Report next relied upon by petitioner is cited for the proposition that the Congress wished to complete the project notwithstanding the Endangered Species Act. Petitioner turns the appropriations committee's view that the Endangered Species Act did not then prohibit completion of the Tellico Project into an expression of

[4] A committee report statement that the project "should be completed" does not compel the conclusion that money so appropriated was intended to be used in a way that would result in the expiration of the snail darter. That money was to complete acquisition and construction (and was in fact so spent), *not* to close the Dam.

putative Congressional intent that the Act *should* not prevent the completion of the Project.

But this language of the Report simply says nothing about exempting Tellico from the Endangered Species Act; at best, it assumed (erroneously) that the Act was simply not an inhibiting factor. Petitioner's conclusion simply does not logically flow from statements in the committee report. We know nothing of what the Committee actually would have done if it had concluded that the Endangered Species Act did prohibit Tellico completion, but we are constrained by well-settled canons of construction to conclude that Congress is presumed to appropriate on the assumption that the law will be complied with. ***Ex parte Endo,*** 323 U.S. 283, 303 n. 24; ***Green*** v. ***McElroy,*** 360 U.S. 504; ***D.C. Federation of Civic Associations, Inc.*** v. ***Airis,*** 391 F. 2d 478 (C.A.D.C.).

The policy implications of petitioner's arguments go far beyond that agency's immediate interest in vindicating its Tellico Dam Project. Petitioner's arguments, if adopted, would enable an agency to avoid compliance with applicable law based on self-serving testimony before an appropriations committee which has been inserted in an appropriations committee report. If an appropriations committee report *alone* is sufficient to indicate a Congressional intent to exempt an agency from applicable law, the orderly process of amending statutes by the substantive committees in Congress is undermined.[5]

[5] In this case, the House Merchant Marine and Fisheries Committee, which has substantive responsibility for Endangered Species Act amendments, did not hear debate on TVA's claimed exemption from that Act. On the other hand, several bills which would exempt the Tellico Project from the Act are currently pending in Congress. H.R. 4167, H.R. 4557, H.R. 5079, 95th Congress, 1st Session (1977).

The potential for this to occur is particularly pronounced in the case of TVA where specific authorizing statutes are not required for each project and the appropriations process is the primary vehicle for review.

Petitioner's theory of implied exemption will be equally disruptive of the appropriations process in Congress. The appropriations acts relied upon by petitioner would not have been subject to a member's point of order under the House Rules since the bills themselves contained no objectionable language. Thus, adoption of petitioner's view of the effect of committe reports would require members of Congress to either amend, or vote against, appropriations acts in order to excise unwanted effects intended by the appropriations committee. We do not believe that the law requires the establishment of this novel and unsettling view.

The cases and policy views which have been discussed disclose the importance of the doctrine of legislation by appropriation to executive agencies and how pervasively it is asserted as a basis for modifying or repealing existing authority. The hostility of the courts to the doctrine in the better-reasoned, modern cases suggests a recognition of these disruptive influences.[6] This case, if decided in favor of petitioner's position on exemption by appropriation, simply

[6] The facts of this case are similar to those in *Atchison, Topeka and Santa Fe Rwy. Co.* v. *Callaway*, 382 F. Supp. 610, 620 (D.D.C.), vacated on other grounds, 431 F. Supp. 722 (D.D.C.). The Corps of Engineers sought an appropriation to undertake project works which it then represented to the appropriations Committee to be authorized by other law, then claimed that very appropriations measure as authority for the action in question when the original authority was found lacking by a court.

could not be seen as having limited application. In point of fact, we are presented here with a fundamental question of separation of powers and of the integrity of the process by which budgets are set, projects are justified, and limitations on agency conduct are enacted and enforced.

For example, the Department of the Interior has recently completed a Congressionally-mandated review of, among other things, the use of the doctrine of legislation by appropriation to expand the scope of the San Luis Unit of the Bureau of Reclamation's Central Valley Project (California) beyond its stated authorization. The Report[7] concluded that the use of this doctrine to expand and alter previously stated statutory limitations has very serious implications for the budget and for the integrity of the economic analysis upon which projects are largely justified.

CONCLUSION

The Secretary of the Interior believes that, properly viewed, the appropriations acts in question should have no particular impact on this litigation; that the only issue needful of resolution is whether the Endangered Species Act applies to the Tellico Project at all; and that it does, as the court of appeals correctly concluded.

Respectfully submitted.

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[7] "Special Task Force Report on San Luis Unit, Central Valley Project, California (Public Law 95-46)" (January 1, 1978).

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